Supreme Court, U.S.
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No. 07-_____

in the

SUPREME COURT OF THE UNITED STATES

PATRICK N. SWEENEY,
Petitioner,
v.
DEPARTMENT OF
HOMELAND SECURITY,
Respondent.

ON A PETITION FOR A WRIT OF
CERTIORARI TO THE UNITED
STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

JOINT APPENDIX

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Note: This disposition is nonprecedential.

United States Court of Appeals for the Federal Circuit
07-3014

PATRICK N. SWEENEY,
Petitioner,
v.
DEPARTMENT OF HOMELAND SECURITY,
Respondent.

Patrick N. Sweeney, of Spring, Texas, pro se.
Joan M. Stentiford, Trial Attorney, Commercial Litigation Branch, Civil Division, United States Department of Justice, of Washington, DC, for respondent. With her on the brief were Peter D. Keisler, Assistant Attorney General, and

Deborah A. Bynum, Assistant Director.
Appealed from: United States Merit Systems Protection Board

NOTE: This disposition is nonprecedential.

United States Court of Appeals for the Federal Circuit
07-3014

PATRICK N. SWEENEY,
Petitioner,
v.
DEPARTMENT OF HOMELAND SECURITY,
Respondent.

DECIDED: May 14, 2007

Before NEWMAN, LOURIE, and GAJARSA, Circuit Judges.
PER CURIAM.

DECISION

Patrick N. Sweeney ("Sweeney") appeals from the final decision of the Merit Systems Protection Board (the "Board") affirming the decision of the U.S. Department of Homeland Security to suspend him from his position as special agent for thirty days due to his failure to follow instructions and his failure to properly secure evidence. Sweeney v. Dep't of Homeland Sec., DA-0752-05-0534-1-2 (M.S.P.B. Aug. 29, 2006) ("Final Decision"). We affirm.

BACKGROUND

Sweeney was employed as a senior special agent for the Immigration and Customs Enforcement, an agency within the U.S. Department of Homeland Security ("DHS") ("agency"). On January 13, 2005, the Assistant Special Agent in Charge, Gene D. Lowery, proposed Sweeney's removal on two charges: first, failure to follow instructions on numerous occasions; and second, failure to properly secure evidence. On June 30, 2005, the agency sustained both charges, and imposed a lesser penalty of a thirty-day suspension without pay, effective July 5, 2005. Those charges arose from certain instances involving Sweeney's unauthorized interaction with a confidential informant ("CI"), a moiety claim1 that Sweeney was instructed to complete but did not, and certain evidence relating to a child pornography investigation that was left unsecured in Sweeney's desk. Special agents are required to abide by certain rules as set forth in the Special Agents Handbook. Chapter 41 of the Handbook states that "controlling agents will not meet or debrief informants without another law enforcement officer in attendance unless they obtain supervisory approval." Sweeney v. Dep't of Homeland Sec., DA-0752-05-0534-1-2, slip op. at 2 (M.S.P.B. May 5, 2006). On February 17, 2004, however, Sweeney met with a CI

involved in a particular case, alone and without the permission of his supervisors. Id., slip op. at 2-3. On March 22, 2004, Sweeney received specific instructions from his supervisor to refrain from having any contact with the aforementioned CI. Id. at 3. However, on April 6, 2004, Sweeney disregarded that instruction and met with the CI in the parking lot of the DHS building. Id. at 3-4. After Sweeney's supervisor, Jeffrey S. Coffman, witnessed Sweeney's meeting with the CI, Coffman telephoned Sweeney and ordered him to immediately report to his office. Although Sweeney agreed to follow that order, he proceeded to walk away from the DHS building and continue his conversation with the CI. Additionally, on two separate occasions, April 5, 2004 and May 17, 2004, Sweeney had telephone conversations with the CI, notwithstanding the order instructing him not to. As to the incident concerning the moiety claim, Sweeney was instructed to complete the claim in February 2004. After failing to prepare it, Sweeney received additional instructions to complete the claim by the close of business on March 26, 2004. Sweeney failed to meet that deadline, and Coffman was required to assign the claim to another employee who ultimately prepared the claim. Regarding the incident involving the unsecured evidence, the agency requires its employees to follow specific procedures

designed to protect the chain of custody of evidence. On March 26, 2004, Sweeney left two compact discs containing evidence relating to a child pornography investigation in an unsecured drawer of his desk, which violated those procedures. Coffman discovered the discs and confirmed with the Forensic Computer Special Agent that the discs contained images of child pornography. On March 29, 2004, Coffman prepared a memorandum detailing his findings. Based on those events, the agency filed the aforementioned charges against Sweeney. After the agency sustained the charges and imposed a thirty-day suspension, Sweeney appealed the agency's decision to the Board. Sweeney admitted that he met with the CI and spoke to him on the telephone in direct contravention of his orders. Sweeney argued, however, that he believed he had permission from another supervisor to meet with the CI and that there was nothing wrong with speaking to him over the phone because he was helping him with a "customs" matter. In addition, Sweeney asserted that he was unaware of deadlines concerning the moiety claim, and was also unaware that the discs that were found in his desk contained child pornography. In addition, Sweeney raised certain affirmative defenses.

On May 5, 2006, Administrative Judge ("AJ") sustained the agency's charges and the penalty of a thirty-day suspension. The AJ determined that the DHS had established by preponderant evidence that Sweeney repeatedly failed to follow instructions and failed to properly secure evidence. Id. at 2-10. In reaching that determination, the AJ found Sweeney to be less credible than the agency's witnesses and found that Sweeney had not provided any evidence to corroborate his assertions. Id. at 3, 5, 8, 10. In addition, the AJ rejected Sweeney's affirmative defenses. In particular, the AJ found that Sweeney failed to prove that the action by the agency was taken in retaliation for purported whistleblowing activities and that the agency committed harmful error. Lastly, the AJ concluded that the penalty imposed by the agency was reasonable and promoted the efficiency of service. Id. at 15.Sweeney sought review by the full Board, the Board denied his petition, and the AJ's decision accordingly became the final decision of the Board. See 5 C.F.R. § 1201.113(b) (2006). Sweeney timely appealed to this court. We have jurisdiction pursuant to 28 U.S.C. § 1295(a)(9).

DISCUSSION

The scope of our review in an appeal from a decision of the Board is limited. We must affirm the Board's decision unless it was "(1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) obtained without procedures required by law, rule, or regulation having been followed; or (3) unsupported by substantial evidence." 5 U.S.C. § 7703(c) (2000); see Briggs v. Merit Sys. Prot. Bd., 331 F.3d 1307, 1311 (Fed. Cir. 2003). We review without deference the Board's legal conclusion on a question of jurisdiction. Bolton v. Merit Sys. Prot. Bd., 154 F.3d 1313, 1316 (Fed. Cir. 1998).

On appeal, Sweeney argues that the AJ committed multiple errors, including exhibiting bias and prejudice during the proceedings and failing to make proper factual and legal determinations. Sweeney further asserts that the Board ignored clear error and new evidence in denying his petition for review. The government responds that substantial evidence supports the Board's decision, that Sweeney's challenges to the AJ's credibility determinations are not reviewable by this court, and that Sweeney's remaining contentions are unsupported and without merit.

We agree with the government that the Board properly sustained both charges. The AJ's conclusion that Sweeney failed to follow instructions was supported by substantial evidence. As for the first charge, the record shows that Sweeney admitted that he failed to follow instructions by speaking to the CI alone and not completing the moiety claim. The AJ credited the testimony of several agency witnesses, including Coffman and David R. Quiles, the Assistant Special Agent in Charge. Both witnesses testified that Sweeney continued to carry on a conversation with the CI in the parking lot and spoke to the CI over the telephone, despite receiving instructions to the contrary.

With regard to the moiety claim, the AJ again credited the testimony of Coffman, as well as the agent who was later assigned the moiety claim. Both testified that Sweeney failed to meet the deadline for completing the moiety claim. As for the second charge of failing to properly secure evidence, the AJ's determination that Sweeney left evidence in his desk, in a manner that was contrary to the agency's procedures and guidelines, was supported by Coffman's testimony. In addition, we find that substantial evidence exists in the record to support the AJ's determinations concerning Sweeney's affirmative defenses.

Moreover, in assigning error to the AJ's factual determinations, Sweeney essentially challenges the credibility determinations made by the AJ. Because the AJ is in the best position to evaluate credibility, his credibility determinations are "virtually unreviewable" on appeal, see Hambsch v. Dep't of the Treasury, 796 F.2d 430, 436 (Fed. Cir. 1986), and will not be disturbed unless inherently improbable, discredited by undisputed evidence, or contrary to physical facts, Hanratty v. Dep't of Transp., 819 F.2d 286, 288 (Fed. Cir. 1987). Sweeney has not met that high burden to disturb the AJ's credibility determinations. Accordingly, we find no basis to disturb the AJ's determination that Sweeney failed to follow instructions and failed to properly secure evidence. In addition, we find Sweeney's argument that the AJ exhibited bias and prejudice equally unpersuasive. In support of his argument, Sweeney alleges that the AJ was biased based on his failure to inquire about "witness tampering." According to Sweeney, the government's counsel "tampered" with a potential witness and, because of that, he did not call that witness to corroborate his testimony. That argument, however, was not raised below, and thus will not be considered on appeal. Wallace v. Dep't of the Air Force, 879 F.2d 829, 832 (Fed. Cir. 1989) ("[o]rdinarily, appellate courts refuse to consider

issues not raised before an administrative agency). Even if it were properly before us, however, that assertion is unsupported by the record. Thus, contrary to Sweeney's assertion that the AJ exhibited bias through "extrajudicial conduct rather than any acceptable legitimate conduct," the AJ considered and weighed the evidence of record and explained his reasoning in a thorough and detailed opinion. Lastly, we disagree with Sweeney's contention that the Board erred in denying his petition for review. Sweeney argues that the Board failed to consider "significant new evidence, error, bias, and non-judicial criminal acts by [the] AJ."

With regard to allegations of wrongdoing by the AJ, those contentions have already been rejected. As for purported new evidence, Sweeney refers to certain memoranda that are only tangentially related, if related at all, to the specific charges at issue. Although not entirely clear, Sweeney appears to rely on certain documents that concern a separate matter—namely, the revocation of Sweeney's authority to carry a firearm. We therefore find that the Board correctly determined that Sweeney failed to present "significant new evidence" to warrant reconsideration of the AJ's initial

decision. Final Decision, slip op. at 1. As such, this argument likewise fails.

We have considered the numerous remaining arguments Sweeney raised in his brief and found none that justify a reversal. Accordingly, we conclude that the Board did not err in affirming his suspension. Because the Board's decision was supported by substantial evidence and not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law, we affirm.

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
DALLAS REGIONAL OFFICE

PATRICK N. SWEENEY,
Appellant,

DOCKET NUMBER
DA-0752-05-0534-I-2

v.

DEPARTMENT OF
HOMELAND SECURITY,
Agency.

DATE: May 5, 2006

Ronald Tonkin, Esquire, Houston, Texas, for the appellant.
Thomas F. Muther, Jr., Esquire, Williston, Vermont, for the agency.

BEFORE:

U. Sidney Cornelius, Jr.
Administrative Judge

INITIAL DECISION

Patrick N. Sweeney refilled an appeal on January 6, 2006, from an action taken by the Department of Homeland Security, Immigration and Customs Enforcement, Office of Investigations, that suspended him for 30 days from the position of Special Agent, effective July 5, 2005. [1]

1. *The appellant initially filed his appeal on July 20, 2006.*

The Board has jurisdiction over this appeal pursuant to the provisions of 5 U.S.C. § 7511-7513. At the appellant's request, a hearing was held in this matter.

Based on the following analysis and findings, the agency's action is AFFIRM ED.

ANALYSIS AND FINDINGS

The agency bears the burden of supporting its action by a preponderance of evidence.

By notice dated January 13, 2005. the agency proposed to remove the appellant for (I) failure to follow instructions and (2) failure to properly secure evidence. Appeal File, Vol. 1, tab 5, subtab 4a. After considering the appellant's written and oral responses to the proposed action, the deciding official determined that a 30-day suspension was the appropriate penalty for the appellant's misconduct. The agency's action may be sustained if it is supported by a preponderance of the evidence. [2]

1. Appeal File, VoL 1, tab I. On November 28. 2005, that appeal was dismissed without prejudice to the appellant's right to refill his appeal no later than January 12, 2006. Appeal File, VoL 1, tab 10

2. A preponderance of the evidence is that degree of relevant evidence that a reasonable person, considering the record as a whole, would accept as sufficient to find that a contested fact is more likely to be true than untrue. 5 CF.R § 1201 .56(c)(2) (2005).

The appellant failed to follow instructions.

Specification one — According to the notice of proposed removal, on February 17, 2004, the appellant met with a confidential informant (Cl) alone without the permission of any supervisory personnel in violation of Chapter 41 of the

Special Agents Handbook. Chapter 41 states, " Controlling agents will not meet or debrief informants without another law enforcement officer in attendance unless they obtain supervisory approval."

Jeffery S. Coffman testified that he .is the agency's Resident Agent in Charge and the appellant's supervisor. He explained that the appellant told him that on February 1 7, 2004. he met with Cl Breaux alone. Coffman confirmed that such a meeting was in violation of the rule set out in the Special Agents Handbook. He said that he had not given the appellant permission to engage in such a meeting

The appellant acknowledged that be met with the CI alone. He related that he told Coffman that he was meeting with the CL however, he admitted that he might not have specifically told him that he was meeting with the Cl alone He claimed that he thought that it was implied that he would be meeting with Breau' alone The appellant also suggested that other supervisors had allowed him to meet with C1s alone in the past

There is no dispute that the appe1lant met with the CI alone on February 17, 2004. Moreover., there s no dispute that the Special Agents Handbook does not permit such meetings without the approval of a supervisor Although the appellant claimed that he thought that Coffmaa was aware of the meeting1 be did not say that Coffman or any other agency supervisor actually gave him permission to meet with the Cl

alone on February 17 Coffman testified unequivocallv that he did not and would, not give his permission for such a meeting The appellant called no witness to support his suggestion that another supervisor gave him permission on that date Accordingly, I find that the agency has shown by preponderant evidence that the appellant met with a Cl alone on February 17 20O4. in violation of the rule set out in the Special Agents Handbook

Specification two — The notice of proposed removal related that, on March 22, 2004, the appellant was directed by his supervisor to have no contact with a Cl in the 'KF industries case. The appellant disregarded the directive and met with the Cl alone on April 6, 2004 in the parking lot of the Houston SAC office

Coffman confirmed that on April 6, 2004, he observed the appellant in the agency a parking lot speaking to Breaux the Cl in the KF Industries case. He related that he had ordered that appellant not to engage in any conversations with the C1. Coffman noted other agency employees were with him when he observed the appellant speaking to the CI in the parking lot.

The appellant did not dispute the agency's allegations that he had talked to Breaux in the agency's parking lot on April 6. 2004, or that Coffman had ordered him not to engage in such conversations. He testified that the UI wanted him to see his new truck and he explained that, because of the Cl's age and health problems. he agreed to speak with him. The appellant asserted that he and the Cl had spoken only about the truck and not any business related to the agency. On cross examination, the appellant acknowledged that the CI told him that he had spoken with Coffman. He also acknowledged that he learned from the Cl that the CI had

told Coffman that he had bought meals for the appellant during the K.F Industries investigation.

There is no dispute that the appellant and Breaux had a conversation in the agency's parking lot. Moreover, there is no dispute that the appellant had been ordered by his supervisor to have no contact with Breau. I do not find persuasive the appellant's suggestion that he could not have simply walked away when Breaux approached him because of his concern for Breaux's age and health. He did not explain why his not speaking with Breaux would have had a detrimental effect on Breaux. Additionally, although the appellant claimed that he and the CL did not discuss agency business, he admitted that Breaux revealed that he had told the appellant's supervisor about meals that he had bought for the appellant. I find, therefore, that the agency has shown by preponderant evidence that on March !2, 2004, the appellant disregarded his supervisor's directive not to meet with the Cl.

Specification three — According to the proposal notice, on April 6, 2004, white the appellant was meeting with the CI, the appellant's supervisor contacted the appellant and directed him to report directly to the supervisor's office. The appellant stated that he would do so and then disregarded his supervisor's instructions. The appellant failed to report to the office as directed.

Coffman testified that on April 6, 2004, after seeing the appellant talking to CI Breaux, he called the appellant by telephone and ordered him to come to his office immediately. Coffman confirmed that, although the appellant agreed to obey his order, he did not immediately do so and that he had to call the appellant again before he complied.

David R. Quiles, Assistant Special Agent in Charge, testified that he was with Coffman on April 6 when Coffman saw the appellant talking to the CI in the parking lot. He said that, after he heard Coffman tell the appellant to return to the building, the appellant continued talking to the CI. He related that Coffman told the appellant twice to come to his office.

Ruben F. Gonzalez, Special Agent In Charge, testified that he observed Coffman and Quiles become agitated on April 6. He related that he heard Coffman tell Quiles that the appellant was not to have any contact with the CI. He said that he heard Coffman trying to get the appellant by telephone several times unsuccessfully. Gonzalez explained that he did not hear the telephone conversation between Coffman and the appellant.

The appellant did not dispute the fact that Coffman called him and told him to report to Coffman's office. He argued that he did so in a timely manner and, therefore, he did not disobey Coffman's order.

A determination of the truthfulness of the agency's allegations turns on the credibility of the witnesses. *Hillen v. Department of the Army*, 35 M.S.P.R. 453, 458 (1987). I find Coffman's and Quiles' testimony to be more credible than the appellant's. Both testified in a direct and straightforward manner and they were sure of their facts. Gonzales acknowledged that he did not hear the conversations between Coffman and the appellant. Quiles testified unequivocally, however, that Coffman ordered the appellant twice to return to the building before he returned.

The appellant acknowledged that he continued to walk towards Breaux's truck after receiving Coffman's first order. He also acknowledged talking to Breaux about the fact that Breaux had informed Coffman that he had bought meals for

the appellant. Moreover, he acknowledged that Coffrnan had to call him twice. Accordingly, I find that preponderant evidence supports the specification alleging that the appellant did not immediately return to Coffman's office after being ordered to do so on April 6, 2004.

Specification four — The notice related that, although the appellant was instructed by his supervisor not to have any contact with the CI in the "KF Industries" case, he accepted and participated in two telephone conversations with the CI. The first occurred on April 5, 2004, lasting eleven minutes. The second conversation occurred on May 17, 2004, lasting four minutes.

Coffrnan confirmed that, as set out in the proposal notice, contrary to his order, the appellant had two telephone conversations with Breaux, the CI involved in the "KF Industries" case. He confirmed that those conversations occurred on April 5, 2004. and May 17, 2004.

The appellant did not dispute the agency's allegation that he had the conversations with Breaux or that he had been ordered not to have any contact with the CI involved in the KF industries" case. He explained that, on April 5, 2004, CI Breaux contacted him by telephone to get Coffman's telephone number. He related that Breaux told him that he was going to have a meeting with Coffrnan and that he needed his telephone number and address. He admitted that he had asked Breaux who had set up the meeting. The appellant said that on May 17, 2004, Breaux contacted him to get the names of attorneys who might assist him with a "Customs" matter. He asserted that he saw nothing wrong with providing that information to Breaux.

The appellant talked to Breaux, the CI in the "KF Industries" case, even after being ordered by Coffman not to have

anything to do with him. Although the record reflects that Breaux initiated both calls, the appellant did not claim that he advised Breaux that he was not to have any contact with him, either time. In fact, the appellant admitted that he asked Breaux on April 5 who had set up his meeting with Coffman and he admitted that, on May 17, he gave Breaux the names of attorneys who might assist him. I find, therefore, that preponderant evidence supports the fourth specification, alleging that the appellant failed to obey his supervisor's order not to have any contact with the CI involved in the 'KF Industries" case on April 5, 2004, and on May 17, 2004.

Specification five — The proposal notice related that, the appellant failed to complete a "Moiety Claim" in relation to a CI in February 2004. The appellant was given further instructions to complete this assignment no later than close of business March 26, 2004. The appellant failed to complete the assignment as directed because he chose to use his time to write and fax a document concerning personal business to his attorney on that date.

Coffman testified that, as reflected in his memorandum to the appellant dated March 29, 2004, the appellant failed to complete the "Moiety Claim"[3] that was originally due in February 2004. Appeal File, Vol. 2, tab 5, subtab 4m. He confirmed that he authored the memorandum and the accuracy of its contents. Coffman related that the appellant never completed the "Moiety Claim" and that he had to assign the job to another employee.

3. *Coffman testified that the money given by the agency to CI's for the information that they provide is known as a "Moiety Claim."*

Jennifer D. Havies testified that she is a Supervisory Criminal Investigator. She said that she had been in that position for approximately one year and four months. Havies related that, before receiving her current position. she had been a Special Agent for eight years. She said that she was familiar with the "KF Industries" case because it had been assigned to her upon her entry into the Houston Area Office in February 2004. She said that Coffman subsequently assigned her the task of completing the "Moiety Claim" in the case. Havies confirmed that the "Moiety Claim" had not been completed by the appellant when she received the case. She also confirmed that the appellant had asked her in March 2004 how the "Moiety Claim" should be filed.

The appellant denied that Coffman had told him to complete the "Moiety Claim by close of business March 2004." He claimed that he had stopped work on the "KF Industries case in February 2004 when he turned the files over to Havies and he denied discussing the "Moiety Claim" with her. On cross-examination, the appellant admitted that he did work on the "Moiety Claim" after the "KF Industries case was turned over to Havies.. He asserted; howeyer, that Coffman had not given him any deadlines to complete work on the claim.

A determination of the truthfulness of the agency's allegations turns on the credibility of the appellant and Coffman. I find Coffman's testimony to be more credible. He testified in a direct and straightforward manner and he was sure of his facts- concerning this specification. Moreover, his testimony was corroborated by the detailed memorandum that he prepared describing the incident. Further, his testimony that the "Moiety Claim" was not prepared by the appellant was corroborated by Havies, who testified that she had to prepare the claim.

The appellant's testimony was less than straightforward. Although he denied talking to Havies about the claim, he provided no reason she would have been untruthful about the conversation. Moreover, the fact that he had turned the case over to Havies is not evidence that Coffman did not still want him to prepare and complete the claim. Additionally, the appellant did not deny that he received Coffman's memorandum, stating that he had not timely completed the claim. He did not explain why, if he had not been ordered to complete the claim, he did not attempt to correct Coffman's erroneous impression after receiving the memorandum. Accordingly, I find that preponderant evidence supports the agency's allegation that the appellant failed to complete the "Moiety Claim" as ordered.

In summary, the agency cited five specifications describing the appellant's failure to follow instructions. I have found that the agency has proven by a preponderance of the evidence each of the five specifications. Accordingly, the charge is sustained.

The appellant failed to properly secure evidence. [4] According to the proposal notice, on March 26, 2003, two compact discs containing copies of evidence from a child pornography case were found by the appellant's supervisor in an unsecured manner on the appellant's desk. The appellant admitted that he left these items unsecured on his desk.

4. In the proposal notice, the agency cited two specifications to support this charge; however, after the hearing, the agency withdrew specification one of this charge. See Appeal File, VoL 3. tab 17.

Coffman testified that on March 26, 2003, he found the two compact discs unsecured on the appellant's desk, with the name of a suspect in one of the appellant's cases written on them. [5] He confirmed that he subsequently contacted Forensic Computer Special Agent Jim Martin, who verified that the discs contained child pornography. He related that he prepared the memorandum dated March 29, 2004, describing what he found on the appellant's desk on March 26. Appeal File, Vol. 2, tab 5, subtab 41.

The appellant testified that he did not know that the discs found on his desk contained child pornography. He acknowledged that he had received the two compact discs on February 9, 2004, related to a case he was investigating; however, he claimed that he did not know if they contained child pornography and he suggested that Coffman may have substituted discs containing pornography for the ones that he had on his desk.

On cross-examination, the appellant admitted leaving two 'working copies" of child pornography discs on his desk. He argued that, because the copies were not actual evidence, he had committed no misconduct by leaving them unsecured on his desk. The appellant also admitted, during his deposition taken on October 18, 2005, that Coffman had found two discs on his desk that were 'working copies" of samples that had been seized earlier; that he had looked at them; and that they contained "a great variety of pornography," including child pornography. Appeal File, Vol. 5. tab 8, p. 113.

5. Although the notice indicated that the compact discs were found on March 26. 2003. Coffman testified that the correct date was March 26, 2004.

I do not find the appellant's testimony credible on this issue. There is no dispute that two discs found on the appellant's desk were left unsecured. First, the appellant denied that there was pornography on the discs. He admitted during his deposition, however, that the discs found by Coffman did contain child pornography. These inconsistencies detract from the credibility of the appellant's testimony. I do not find persuasive the appellant's suggestion that "working copies" did not have to be secured. He provided no evidence to contradict Coffman's testimony to the contrary.

Coffman was sure of his facts. Further, his testimony was supported by the memorandum he prepared shortly after discovering the discs on the appellant's desk. I find, therefore, that preponderant evidence supports the agency's allegation that on March 26, 2004, the appellant left unsecured, evidence from a child pornography case on his desk.

In this case, the agency has acknowledged that, although two specifications were cited showing that the appellant failed to properly secure evidence, only one specification could be proven. I have found that the agency has shown by preponderant evidence that the appellant failed to properly secure two compact discs containing child pornography. The Board has held that proof of one or more, but not all, of the specifications is sufficient to support the charge. See Viens v Department of Interior, 92 M.S.P.R. 256, 265 (2002). Accordingly, I find that the charge that the appellant failed to properly secure evidence is sustained.

The appellant asserted affirmative defenses on which he bears the burden of proof.

The appellant alleged the agency action was taken in retaliation for his whistleblowing activities. Appeal File,

Vol. 3, tab 11. He also alleged that the agency committed harmful error in taking the action against him. The appellant bears the burden of Proof on his affirmative defenses. 5 C.F.R. § 120 l.56(a)(2) (2005.).

The appellant has failed to show that the agency's action was taken in retaliation for his whistleblowing activities.

The appellant identified protected disclosures that he claimed led to the agency's retaliatory action. Appeal File. Vol. 3, tab 10. First, he related that on May 1, 2003, he filed a complaint with the Office of Special Counsel (OSC) claiming that agency employees, Tarver and Quiles, violated 5 U.S.C. § 2302(b)(4) and 5 U.S.C. § 2302(12) when they threatened him with disciplinary action because he failed to fill out a Form 'OF 612" to Quiles' satisfaction. He said that 5 U.S.C. § 552a(e)(3)(A) was violated by the employees because the law requires that the individual from whom information is sought be informed of the authority under which the information is sought and informed whether the disclosure is mandatory or voluntary. The appellant stated that Tarver and Quiles failed to so inform him. [6]

The appellant further related that, on January 3. 2005, he filed his second complaint with OSC, claiming that Robert P. Rutt, Deputy Assistant in Charge, committed violations of law [7] because he had made allegations that Coffman tried to extort payments from him for repairs to a trailer that Coffman had bought and that Coffman had had an

6. The appellant did not explain how 5 U S C § 2302(h)(4) and 5 U S.C. § 2302(12) were violated.

7. According to the appellant's OSC complaint, Rutt had revoked the appellant's authorization to carry a firearm See Appeal File, Vol. 1, tab I, Ex 4

inappropriate relationship with a woman whose father was a criminal defendant in a case being investigated by the agency.

The appellant testified that he had advised the deciding official, Joseph R. Webber, of his 2003 OSC complaint. He also testified that he had advised Rutt that he had filed an OSC complaint in January 2005. The appellant related that he had also advised Associate General Counsel James DeStefano and Assistant United States Attorney Martha Minnis of Coffman's inappropriate relationship in June 2004. Appeal File, Vol. 3,tab.1.

The Whistleblower Protection Act (WPA) prohibits an agency from taking a personnel action as reprisal for an employee's having made a protected disclosure. A disclosure protected by the WPA is one which the employee reasonably believes evidences a violation of law, rule, or regulation, gross mismanagement, a gross waste of funds, an abuse of authority, or a specific danger to public health and safety. See 5 U.S.C. § 2302(b)(8).

The appellant has the burden of proving that a reasonable person in his position would have reasonably believed that a disclosure is covered by the WPA.

The appellant's burden also requires him to show that his protected disclosure was a contributing factor in the agency's decision to take the personnel action at issue. See Scott v. Department of Justice, 69 M.S.P.R. 211, 236, a/l'd, 99 F.3d 1160 (Fed. Cir. 1995) (Table). If the appellant meets this burden, the burden of proof shifts to the agency to demonstrate, by clear and convincing evidence, that it would have taken the same personnel action in the absence of such disclosure. Id. Clear and convincing evidence is that measure or degree of proof that produces in the mind of the trier of

fact a firm belief as to the allegations sought to be established, and is a higher standard than the preponderance of the evidence standard. See 5 C.F.R. § 1209.4(d) (2005).

Joseph R. Webber, Special Agent in Charge and the deciding official. acknowledged that he had heard that the appellant had filed a complaint with OSC. He explained that he did not know, however, until the appellant advised him in his reply to the proposal notice that the appellant had alleged misconduct on the part of Coffman. Webber asserted that the appellant's OSC complaint had no bearing on his decision to suspend the appellant for 30 days.

In weighing an agency's assertion that it would have taken an action against an employee without regard to disclosures protected by 5 U.S.C. § 2302(b)(S), the Board properly assesses the evidence as it stood at the time of the action. See Yunus v. Department of Veteran Affairs, 242 F.3d. 1367, 1372 (Fed. Cir. 2001). Later developments cannot be used to either support or undercut the validity of the agency action taken. In determining whether an agency has met its burden, the Board considers (1) the strength of the agency's evidence in support of its personnel action (2) the existence and strength of any motive to retaliate on the part of the individuals who were involved in the decision and (3) any evidence that the agency takes similar actions against employees who are not whistleblowers but who are otherwise similarly situated to the appellant See Sutton v. Department of Justice, 94 M.S.P.R. 4, 13 (2003).

I have found that the agency has supported its allegations by a preponderance of the evidence. Although Webber may have been aware of the appellant's OSC complaint and allegations against Coffman, the appellant failed to explain why Webber would want to retaliate against him. Webber, in fact, testified that after learning the specifics of the

appellant's allegations against Coffman he instituted an investigation into the alleged misconduct. Moreover, the appellant provided no reason that the proposing official, Gene D. Lowery, might want to retaliate against him because of his allegations. [8] In addition, the appellant cited no employee who was found to have engaged in the same or similar misconduct, had not made disclosures, and was penalized less harshly by the agency.

Weighing the factors, I find that clear and convincing evidence shows that, even if there had been no protected activity, Webber would have decided to suspend the appellant for 30 days. Consequently, assuming arguendo that the appellant made disclosures protected under 5 U.S.C. § 2302(b)(S), the agency has shown that it would have taken the same action in the absence of the disclosures. Therefore, this affirmative defense must fail.

The appellant has failed to show that the agency committed harmful error [9] in reaching its decision to remove him.

The appellant asserted that the agency committed harmful error as a result of its statement in the proposal notice that the compact discs containing child pornography were found on his desk on March 26, 2003, rather than 'March 26. 2004." He did not explain how the agency's error was

8. The appellant did not indicate that Glen D. Lowery, the proposing official, was aware of his disclosures.

9. Harmful error is error by the agency in the application of its procedures that is likely to have caused the agency to reach a conclusion different from the one it would have eached in the absence or cure of the error. 5 C.FR § 1201.56(c)(3) 2OO5).

harmful. In fact, the appellant noted in his response to the proposal notice that the correct date was March 26, 2004." See Appeal File, Vol. 2, tab 4c, p. ii. The Board has held that while the information provided by the agency must be sufficiently specific to permit the appellant to respond to the agency's charge, the charge must be viewed in light of accompanying specifications and circumstances and should not be technically construed. See Robb v. Department of Defense, 77 M.S.P.R. 130 (.1998). In this case, the record reflects that the appellant was given sufficient notice of the agency's charge that he was able to fully respond to the allegations. The appellant has failed to show how, but for the agency's error, it would have reached a different conclusion regarding the charge. Accordingly, I find that the appellant's harmful error allegation must fail.

The penalty selected by the agency is reasonable and promotes the efficiency of the service.

An adverse action may only be taken for such cause as will promote the efficiency of the service. 5 U.S.C. § 7513(a). The Board has held that disciplinary action for the misconduct cited by the agency promotes the efficiency of the service. See Grubb v Department of Interior, 96 M.S.P.R. 361, 371 (2004). Nevertheless, before it can be concluded that a particular penalty promotes the efficiency of the service, it must appear that the particular penalty takes reasonable account of all relevant factors in the particular case. See Douglas v. Veterans Administration, 5 M.SP.R. 280, 303 (1980). In making such determinations, the Board gives due weight to the agency's primary discretion in exercising its managerial function of maintaining employee discipline and efficiency, recognizing that the Board's function is not to displace management's judgment, but to assure that it has been properly exercised. See id. 306.

Webber testified that he considered the Douglas factors in making his decision. He noted that he had completed, with the assistance of the agency's personnel office, the Douglas factors form found in the record. Appeal File, Vol. 2, tab 5, subtab 4(b). He related that he considered the appellant's written and oral responses to the charges and he noted that the appellant had had a satisfactory work record during his tenure with the agency. He pointed out; however, that the appellant had been disciplined previously for similar misconduct. [10] Under these circumstances, Webber said that he determined that a 30-day suspension was the appropriate penalty.

Although the agency withdrew one specification regarding the appellant's failure to properly secure evidence, I find that the remaining misconduct was serious. Moreover, as noted by the deciding official, the appellant has been charged with similar misconduct in the past. Further, law enforcement employees are held to a higher standard of conduct. See Crawford v. Department of Justice, 45 M.S.P.R. 234, 237 (1990). An agency must have employees it can trust to obey its rules and regulations. The appellant's misconduct raises legitimate concerns about his judgment and trustworthiness. I find that Webber considered the relevant Douglas factors in

10. The notice of proposed removal related that the appellant received a one-day suspension on November 11, 2003, for failure to readily respond to his supervisor's instructions. The appellant did not dispute the fact that he was informed of the actions in writing, it is a matter of record, and he was permitted to dispute the matter before a higher level of authority than the one that imposed the discipline See Boiling v Department of the Air Force, 9 r4.S P.R. 335. 339-40 (1981.) 1 find that consideration of the prior disciplinary actions was appropriate.

making his determination of the appropriate penalty in this case. Accordingly, I find that the penalty of a 30-day suspension is reasonable and that it promotes the efficiency of the service.

DECISION
The agency's action is AFFIRMED.

FOR THE BOARD:
U. Sidney Cornlius. Jr.
Administrative Judge